Chapter 19 - Probation and Probation Revocation

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The Prosecutor's Manual
Chapter 19
Probation and Probation Revocation

I. FOREWORD

This manual is a discussion of Rule 27: Probation and Probation Revocation. It is intended to aid the prosecutor when he/she is dealing with probation and probation revocation. The cases, rules and statutes have been pulled together so that a beginner can read the chapter and understand probation and revocation. The advanced prosecutor can use the sections for quick research for memorandums or getting the citation for the law they already know.

In general, probation is not referred to as a sentence, but instead is denominated a matter of "legislative grace." *State v. Mears*, 134 Ariz. 95, 98, 654 P.2d 29, 32 (App. Div. 1 1982). *See also State v. Christopher*, 133 Ariz. 508, 652 P.2d 1031 (1982).

> [I]t is a sentencing alternative which a court may use in its sound judicial discretion when the rehabilitation of the defendant can be accomplished with restrictive freedom rather than imprisonment. The court can surround probation with restrictions and requirements which a defendant must follow to retain his probationary status. Revocation, and consequential loss of freedom, is considered when charges are made that one or more of the conditions of probation have been violated.

State v. Smith, 112 Ariz. 416, 419, 542 P.2d 1115, 1118 (1975).

Because of the unique characteristics of probation, a unique rule must exist to govern it. See 17 A.R.S. Rules of Criminal Procedure, Rule 27 (hereinafter Rule 27).

When the initial decision to grant probation has been made at sentencing, Rule 27 takes over and governs the procedures thereafter. See Rule 27.1, comment. Rule 27 not only governs probation procedures but also ensures that due process is not violated when a probation is being enforced. *See State v. Stotts*, 144 Ariz. 72, 695 P.2d 1110, 1116 (1985).

II. STATUTORY AUTHORITY

A defendant has no constitutional right to probation. Probation is a matter of "legislative grace." *Mears, supra*. The primary statutes dealing with probation are A.R.S. §§ 13-901 to 13-924. Other statutes affect probation in various ways. The enhanced punishment sections mean that only nondangerous, non-class 1 felony first time offenders are eligible for probation.

Restitution, as called for in A.R.S § 13-603(C), is required regardless of whether the defendant is able to pay. A.R.S. § 13-804(C). The court must fix the amount and manner of performance of restitution. A.R.S. § 13-901(H). The court must fix the amount of restitution without regard to defendant's ability to pay. A.R.S. § 13-901 and 13-804(C); *State v Fox*, 153 Ariz. 493, 738 P.2d 364 (App. Div. 2 1986). Fines are allowed as a condition of probation. A.R.S. § 13-901(A). The fine may be allocated as restitution. A.R.S. § 13-804(A). Unlike restitution, a fine can be deemed excessive based on the defendant's ability to pay and/or the circumstances of the offense. *State v. Marquez-Sosa*, 161 Ariz.

500, 779 P.2d 815 (App. Div. 1 1989).

Any court imposing probation must impose a waiver of extradition condition of probation. A.R.S. § 13-901(A). A monthly probation service fee must be imposed unless the court finds that the defendant is unable to pay that amount. A.R.S. § 13-901(A). The amount of the fee is set forth in the statute. *Id*.

A. Length of Probation

The length of the probation term is set forth in A.R.S. § 13-702. The length of probation is determined by the class of the offense committed.

Class 2 Felony	Seven years
Class 3 Felony	Five years
Class 4 Felony	Four years
Class 5 Felony	Three years
Class 6 Felony	Three years
Class 1 Misdemeanor	Three years
Class 2 Misdemeanor	Two years
Class 3 Misdemeanor	One Year

1. Incomplete Restitution Extension

If restitution has been ordered and the amount is not satisfied at the end of the probation, the court may extend the probation period up to five additional years for felonies and up to two years for misdemeanors. A.R.S. § 13-902(C). An extension of the probation term is considered a modification which requires written notice to the probationer that his term will be extended. *State v. Korzuch*, 186 Ariz. 190, 193, 920 P.2d 312, 316 (1996).

Extension of the additional period for a class 6 felony beyond a year does not necessarily mean the offense must be designated a felony at the time of final sentencing. *State v Fox*, 153 Ariz. 493, 738 P.2d 364 (App. Div. 2 1986).

2. Consecutive Probation and Prison

Consecutive sentences of probation are prohibited. *State v. Shepler*, 141 Ariz. 43, 684 P.2d 924 (App. Div. 2 1984). However, if concurrent probation grants are revoked, the judge may impose consecutive sentences. A.R.S. § 13-901(C). The court may impose both a prison sentence and a sentence of probation, but the service of the prison sentence cannot satisfy the probation term. A.R.S. § 13-903(E); *State v. Jones*, 124 Ariz. 24, 601 P.2d 1060 (1979).

B. Interruption of Probation Periods

1. Petition to Revoke

Filing a petition to revoke probation tolls the running of the probation period. If defendant is found not to have violated his probation, there is no interruption in the probationary period. A.R.S. §13-903(B).

2. Absence from Supervision or Jurisdiction

Defendant's absence from either the jurisdiction or required supervision tolls the running of the probationary period. The period does not restart until defendant returns to the probation service, whether voluntarily or involuntarily. A.R.S. § 13-903(C).

3. Serving Another Sentence

If a defendant receives probation while serving a sentence of imprisonment for another conviction, the time spent serving the sentence does not satisfy the probation requirement. A.R.S. § 13-903(E).

C. Incarceration

1. Jail and Prison Time

The court may impose a probation condition requiring defendant to serve jail time. The court may impose time up to a year for felony convictions, six months for a Class 1 misdemeanor, four months for a class 2 misdemeanor and thirty days for a Class 3 misdemeanor. A.R.S. §§ 13-901(F) and 13-707. Any jail time served counts as a credit if probation is revoked and sentence is imposed. A.R.S. § 13-903(F). The defendant must be warned when pleading guilty if flat jail time could exceed the length of the possible prison sentence. *State v. Cutler*, 121 Ariz. 328, 590 P.2d 444 (1979); *State v. Benally*, 137 Ariz. 253, 669 P.2d 1030 (App. Div. 1 1983) (one year flat time not excessive). For aggravated DUI convictions in which the defendant must serve a mandatory prison term before placement on probation, the court may not impose a jail term that would make the combined incarceration term exceed one year. *State v. Sanchez*, 191 Ariz. 418, 956 P.2d 1240 (App. Div. 2 1997).

With the advice of the Director of the Department of Corrections, the court can impose a probation condition requiring defendant to serve 45 days in prison. Defendant is almost certainly entitled to credit for the time spent in prison as a probation condition. *State v. Wietholter*, 130 Ariz. 323, 636 P.2d 101 (1981).

2. Jail Time and Guilty Pleas

The court may not impose more jail time than the defendant could be required to serve if defendant were sentenced to prison, unless defendant is warned when he pleads guilty. *State v. Cutler*, 121 Ariz. 328, 330, 590 P.2d 444, 446 (1979). *Cutler* held a defendant's plea was involuntary where defendant was not warned that a flat time probation jail sentence of a year could exceed his presumptive prison sentence with its good time credits. *Accord State v. Soto*, 126 Ariz. 477, 616 P.2d 937 (App. Div. 1 1980) (defendant not warned 1 year exceeded jail sentence for DUI).

D. Proposition 200 Offenses

1. Applicability

A.R.S. § 13-901.01 requires defendants convicted of a first or second personal possession drug offense to be sentenced to probation so long as the defendant has no prior violent record and/or the drug was not methamphetamine.

Proposition 200 applies to persons convicted of possession of drug paraphernalia, (*State v. Estrada*, 201 Ariz. 247, 252, ¶ 24, 34 P.3d 356, 361 (2001)), and possession of narcotic drugs in a school free zone, (*State v. Pereyra*, 199 Ariz. 352, 18 P.3d 146 (App. Div.1 2001)), but not to drug DUI offenses, (*Wozniak v. Galati*, 200 Ariz. 550, 30 P.3d 131 (App. Div.1 2001)), promoting prison contraband, (*State v. Romero*, 216 Ariz. 52, 53, 162 P.3d 1272, 1273 (App. Div.2 2007)) or possession for sale (A.R.S. § 13-901.01(C)). Division Two of the Arizona Court of Appeals held that attempted possession convictions do not count as prior convictions under Prop 200. *State v. Ossana*, 199 Ariz. 459, 462, 18 P.3d 1258, 1261 (App. Div. 2 2001). However, Division One held that prepatory offenses will count as prior Prop 200 convictions. *Raney v. Lindberg*, 206 Ariz. 193, 199-200, 76 P.3d 867, 873-74 (App. Div. 1 2003).

A person previously convicted of a violent crime is not eligible for Prop 200 sentencing. A.R.S. § 13-901.01(B); *State v. Benak*, 199 Ariz. 333, 18 P.3d 127 (App. Div. 1 2001). If the state fails to allege the violent crime, he is subject to Prop 200 sentencing and cannot be sentenced to jail time for a first drug conviction, even if he violates probation. *State v. Hensley*, 201 Ariz. 74, 77, ¶ 12, 31 P.3d 848, 851 (App. 2001). However, the state does not have to allege a prior drug conviction in order for the court to sentence the defendant as a second time offender under A.R.S. § 13-901.01. *Raney v. Lindberg*, 206 Ariz. 193, 197, 76 P.3d 867,871 (App. Div. 1 2003).

2. Jail as a Probation Condition

Prior to 2002, a Prop 200 defendant could not be given a jail term as a condition of reinstated probation. *Calik v. Kongable*, 195 Ariz. 496, 990 P.2d 1055 (1999); *O'Connor v. Hyatt*, 207 Ariz. 409, 87 P.3d 97 (App. Div. 1 2004). Now, however, the court may impose additional conditions including community restitution and incarceration upon a finding that a probationer refused to participate in a court-ordered drug treatment or committed a new drug offense. A.R.S. § 13-901.01(E).

For a second time Prop 200 offender, the court may impose jail as a condition of probation if necessary. A.R.S. § 13-901.01(F).

3. Drug Treatment

The purpose of Prop 200 was to provide defendants convicted of drug offenses the opportunity to obtain treatment and rehabilitation. Accordingly, A.R.S. § 13-901.01(D) requires a defendant to undergo drug treatment as a condition of probation. The refusal to participate in drug treatment may lead to probation revocation proceedings in which the court can require additional conditions of probation, including jail time. A.R.S. § 13-901.01(E). The refusal to participate in drug treatment as a condition of probation can also disqualify the defendant's eligibility for sentence under Prop 200. A.R.S. § 13-901.01(H)(2).

E. Statement of Reasons for Probation

On every sentence where probation is granted, the court shall state the reasons for the sentence. *State v. Mathews,* 130 Ariz. 46, 50, 633 P.2d 1039, 1043 (App. Div. 1 1981).

F. Probation Revocation & Unsuccessful Termination

A defendant's probation can be "unsuccessfully terminated" under A.R.S. § 13-901(E) if " (1) justice will be served; and (2) the conduct of the defendant indicates rehabilitation." *State v. Lewis*, 224 Ariz. 512, ¶ 15, 233 P.3d 625 (App. Div. 1 2010). A defendant's probation may be revoked for crimes committed before the date of the defendant's previous petition to revoke and reinstatment on probation. *State v. Findler,* 152 Ariz. 385, 732 P.2d 1123 (App. Div. 1 1987).

III. Rule 27.1: Imposing Probation

Rule 27.1 sets out the procedures for the imposition of probation. This rule specifically empowers the sentencing court to impose probation. The comment to Rule 27.1 explains that "sentencing court" refers to a superior court or a justice court that sentences a defendant to probation. Under Rule 27.1, the sentencing court is allowed to impose any conditions of probation as long as the purpose is reasonably related to the goal of rehabilitation. In addition, Rule 27.1 empowers the probation officer to impose conditions of probation which are necessary and not inconsistent with the conditions the court imposes.

A. Conditions

Rule 27.1 does not clarify what conditions qualify as "rehabilitative." The comment to Rule 27.1 state that the present practice is to permit the sentencing court to impose "such terms and conditions as it determines," and the case law supports this.

> Unless the terms of probation are such as to violate basic fundamental rights or bear no relationship whatever to the purpose of probation over incarceration, we will not disturb the trial court in the exercise of its discretion in imposing conditions of probation.

State v. Montgomery, 115 Ariz. 583, 584, 566 P.2d 1329, 1330 (1977). Whatever conditions a sentencing court imposes must give the defendant fair notice of the conduct proscribed. *State v. Sheehan*, 167 Ariz. 370, 372, 807 P.2d 538, 540 (App. Div. 1 1991).

It should be noted that although the sentencing court may use its discretion, this discretionary power of the sentencing court to impose probation is limited by several statutory provisions. *See Green v. Superior Court, Cochise County,* 132 Ariz. 468, 471, 647 P.2d 166, 169 (1982). Refer to Section II of this chapter.

The Arizona Supreme Court has stated that as a condition of his probation, a probationer does have a positive duty to keep his probation officer notified of his whereabouts. *State v. Bly,* 120 Ariz. 410, 412, 586 P.2d 971, 973 (1978). Other conditions presently being imposed by some Arizona counties include: (1) to lead a law abiding life, (2) to abide by rules and regulations imposed by the probation officer, (3) not to consume alcoholic beverages, and/or, (4) to undergo medical treatment. See Rule 27.1, comment.

The following is a discussion of other conditions that have been imposed.

1. Warrantless Searches

A probationer/parolee may be required to submit to searches and seizures of his/her person or property by any probation officer and/or police officer without the benefit of a search warrant. This condition has been found to constitute a reasonable and necessary element of the probationary program. *State v. Montgomery,* 115 Ariz. 583, 566 P.2d 1329 (1977); *State v. Webb*, 149 Ariz. 158, 717 P.2d 462 (App. Div. 2 1985) (parolee).

This condition may be constitutionally imposed. *See Griffith v. Wisconsin,* U.S. 107 S.Ct. 3164 (1987); *United States v. Consuelo Gonzales*, 521 F.2d 259 (9th Cir. 1975); *State v. Montgomery,* 115 Ariz. 583, 566 P.2d 1329 (1977); *State v. Goettel,* 117 Ariz. 287, 572 P.2d 115 (App. Div. 1 1977); *State v. Robledo,* 116 Ariz. 346, 549 P.2d 288 (App. Div. 1 1977).

a. Standard for Search

The standard for a search, despite the existence of a consent to search condition, is still "reasonable cause". *State v. Webb*, 149 Ariz. 158, 163, 717 P.2d 462, 467 (App. Div. 2 1985) *citing United States v. Johnson*, 722 F.2d 525, 527 (9th Cir. 1983). *But see generally People v. Bravo,* 738 P.2d 336 (Cal. 1987)(search on less than reasonable suspicion upheld on consent theory). Although *Griffith* approved only a statutorily authorized regulation, the Arizona case law should be an adequate substitute, since the Arizona court standard and the Wisconsin regulatory standard are the same.

b. Notice and Consent Necessary

Notice and consent of a search by probationer may be required in order to make a search valid, and a third party may not give consent. *State v. Jeffers*, 116 Ariz. 192, 195, 568 P.2d 1090, 1093 (App. Div. 2 1977), *disapproved on other grounds in State v. Montgomery*, 115 Ariz. 583, 566 P.2d 1329 (1977).

c. Unexpected Visit

It was not illegal or unconstitutional for the probationer's probation officer to unexpectedly visit the probationer and request a urine sample from the probationer. The officer had become suspicious that the probationer was flushing himself with liquids prior to giving the routine samples that were a condition of his probation. The court stated that even if taking the sample was a seizure under the Fourth Amendment, it was proper because probationer was also required to submit to warrantless searches at any time by a probation officer. *State v. Robledo,* 116 Ariz. 346, 549 P.2d 288 (App. Div. 1 1977).

d. Police Officer Involvement

Where the probationer was required, as a condition of his probation, to submit to warrantless searches of his person and property as requested by a probation officer, the Arizona Court of Appeals found that the warrantless search of the probationer's luggage by probation officers was not rendered improper by the degree of involvement by police officers in the situation. The court stated there is "no substantial legal basis for [the] claim that cooperation between probation officers and police will invalidate the probation officer's search." *State v. Turner*, 142 Ariz. 138, 143, 688 P.2d 1030, 1035 (App. Div. 2 1984).

2. Waiver of Fifth Amendment Rights/Speak Truthfully to Probation Officer

The court may not require a probationer to waive his right against self-incrimination as a condition of probation. *State v. Eccles*, 179 Ariz. 226, 877 P.2d 799 (1994). It may, however, require the defendant to agree to "answer truthfully, any questions [asked by] the probation officer, counselors, polygraph examiners, or any other agent of the Probation Department's treatment programs." Id. at 228, 877 P.2d at 801.

3. Restitution

Restitution as a probation condition is consistent with the rehabilitative purposes of probation and also requires the defendant to recognize and admit the consequences of his criminal actions. *State v. Merrill*, 136 Ariz. 300, 665 P.2d 1022 (App. Div. 1 1983).

Restitution is required as a probation condition whenever the victim has suffered economic loss. *State v. Monick*, 125 Ariz. 593, 595, 611 P.2d 946, 948 (App. Div. 1 1980); A.R.S. § 13-901(A),(H); A.R.S. § 13-603(C); A.R.S. § 13-804. The court must decide the amount of restitution without consideration of defendant's ability to pay. *State v. Fox*, 153 Ariz. 493, 738 P.2d 364 (App. Div. 2 1986) (no petition to review filed); A.R.S. § 13-804(C). Because the court retains jurisdiction over the defendant while his sentence is suspended and his is on probation, the court is not required to fix the amount of restitution when it imposes restitution as a probation condition. The judge can order restitution when probation is subsequently revoked and the defendant sentenced to prison term. *State v. Holguin*, 177 Ariz. 589, 591-92, 870 P.2d 407, 409-410 (App. Div.1 1993).

Any restitution order is probably ultimately limited by the defendant's ability to pay and the ten year limitation on probation. A person's probation may not be revoked for failure to pay if that person was unable to pay. *See State v. Robinson*, 142 Ariz. 296, 689 P.2d 555 (App. Div. 1 1984). Moreover, the probationer is expected make sufficient bona fide efforts to acquire resources to pay some amount toward restitution during periods of reduced income and his probation can be revoked for the willful failure to pay anything toward restitution during that time. *State v. Stapley*, 167 Ariz. 462, 808 P.2d 347 (App. Div. 2 1991).

The amount of restitution to award is typically based on the fair market value of the property at the time of the loss. However, in some cases, e.g. a car just driven off the lot, the fair market value of the property may not make the victim whole. In such cases, the purchase price or replacement value may be considered. *State v. Ellis*, 172 Ariz. 549, 838 P.2d 1310 (App. Div. 1 1992).

a. Reasonably Related to Conviction

Reimbursement must be related to the offenses for which defendant is convicted or pleads guilty. "It is well settled that a defendant may be ordered to pay restitution only on charges that he has admitted, on which he has been found guilty, or upon which he has agreed to pay restitution." *State v. Pleasant*, 145 Ariz. 307, 308, 701 P.2d 15,16 (App. Div. 1 1985)(absent admission defendant could not be ordered to pay restitution on two counts dismissed in return for two guilty pleas). A defendant could not be ordered to pay restitution after he pled guilty to leaving the scene of an accident where there was no evidence that defendant leaving the scene made the injuries and damages worse. *State v. Skiles*, 146 Ariz. 153, 704 P.2d 283 (App. Div. 2 1985).

If the trial court erred in including a restitution order to the victim of an unrelated crime, the probationary sentence does not need to be set aside. The court can simply modify the conditions of probation to remove the erroneous condition. *State v. Monick*, 125 Ariz. 593, 595, 611 P.2d 946, 948 (App. Div.1 1980).

If you are pleading a defendant, be sure to get an admission defendant caused the harm in the dismissed counts and/or his agreement to pay restitution for damages not covered by the counts defendant is pleading to. Get the same admission and/or agreement if you are taking a plea to a different or lesser offense whose elements do not include causing the harm for which restitution is necessary.

b. Repay County Medical Costs

The probationer was properly required, as a condition of probation, to repay a county for his medical expenses incurred during a shootout he had with the sheriff. The trial court did not err in imposing this condition because the restitution to the county was found to contribute to the rehabilitative purposes of probation. *State v. Young*, 137 Ariz. 365, 670 P.2d 1189 (App. Div. 1 1983).

c. Repay Insurance Company

It was permissible to order the defendant to pay an insurance company as a probation condition since the order was consistent with rehabilitation. The insurance company was found to be a victim within the meaning of A.R.S. § 13-901(A). *State v. Merrill*, 136 Ariz. 300, 665 P.2d 1022 (App. Div. 1 1983).

4. Reimbursement

Reimbursement for various expenses has been upheld as a probation condition. *See State v. Balsam*, 130 Ariz. 452, 636 P.2d 1234 (App. Div. 2 1981) (ordering reimbursement for extradition costs held valid because it was rehabilitative in the sense it awakened defendant to the societal costs of his actions); *State v. Hersch*, 135 Ariz. 528, 662 P.2d 1035 (App. Div. 2 1982) (defendant could be required to reimburse the county for the cost of prosecution).

A probation condition requiring reimbursement is not unconstitutional merely because the defendant might be unable to pay in the future. *See State v. Balsam*, 130 Ariz. 452, 636 P.2d 1234 (App. Div. 2 1981).

5. Support Payments

Under A.R.S. § 13-901(A), a defendant may be required to pay a fee, if he can bear it, to support the probation services. The statute is not an impermissible legislative intrusion into a judicial function nor is the statute found to be violative of due process. *State v. Mears*, 134 Ariz. 95, 654 P.2d 29 (App. Div. 1 1982).

6. No Association With Certain Persons

A probation condition may prohibit a defendant from associating with undesirable persons, (i.e., convicted criminals or persons who may lead probationer to violate the law), unless the probationer has the permission of a probation officer. *See State v. Morales*, 137 Ariz. 67, 658 P.2d 910 (App. Div. 2 1983); *State v. Mathews*, 130 Ariz. 46, 633 P.2d 1039 (App. Div. 1 1981). It has been determined that this condition gives a probationer fair warning of the conduct proscribed.

Similarly, defendants convicted of a sexual offense can be required not to have contact with minors. This can include instruction on how to behave while in public and a requirement that the probationer leave if children come to his house, even for a short period of time. *State v. Maggio,* 196 Ariz. 321, 996 P.2d 122 (App. Div. 1 2000).

7. Medical or Mental Treatment

As previously mentioned, the sentencing court might impose a probation condition which requires the probationer to undergo medical or mental treatment. C.f. *State v. Christopher,* 133 Ariz. 508, 652 P.2d 1031 (1982) (the pre-sentence report recommended chemical castration and behavior modification therapy as a probation condition). However, neither the state's power to impose probation conditions nor the purposes of probation give a defendant a constitutional due process right to effective treatment and rehabilitation. *Id*.

Therefore, if a defendant is required to undergo treatment and is not rehabilitated, that person may not rely on the failure of the "rehabilitation" to exempt him from culpability for subsequent crimes. *See State v. Meehan,* 139 Ariz. 20, 22, 676 P.2d 654, 656 (App. Div. 2 1983)("A person who has been given a break and placed on probation or parole and is not amenable to rehabilitation through such unstructured means is not to be dealt with lightly if he fails.")

The court may interpret separate conditions in conjunction with one another to require the defendant to seek treatment. *State v. Rahe*, 22 Ariz.App. 14, 522 P.2d 755 (App. Div. 1 1974). In *Rahe,* the court found the following two conditions required the defendant/probationer to attend and participate in a drug rehabilitation program as a condition of remaining on probation 1) "Defendant shall participate and cooperate fully in any program involving professional assistance and counsel, whether vocational, medical or psychological as directed by the probation officer", and 2) "Apply for narcotics rehabilitation program."

8. Deportation and Illegal Reentry

When an undocumented immigrant is convicted of a crime and placed on probation, the trial court can impose special terms relating to his or her status. That authority, however, is somewhat limited.

> A court can order as a condition of probation that the probationer comply with the law, federal as well as state. The trial judge can therefore order that [a defendant] be turned over to the appropriate authorities for proceedings not inconsistent with the law. A state trial judge cannot, however, make a decision that controls the entry of an alien into the United States. Such control is exclusive to the United States and without the jurisdiction of a state court.

State v. Camargo, 112 Ariz. 50, 52, 537 P.2d 920, 922 (1975). Accordingly, a trial court can order that a probationer refrain from remaining or entering the United States illegally. *State v. Marquez-Sosa,* 161 Ariz. 500, 502, 779 P.2d 815, 817 (App. Div. 1 1989). However, the court cannot require the defendant agree to deportation. *State v. Patel,* 160 Ariz. 86, 89, 770 P.2d 390, 393 (App. Div.1 1989).

9. Intensive Probation

"The court may suspend the imposition or execution of the sentence and grant the offender a period of intensive probation…." A.R.S. § 13-914(C). The court may place a defendant on intensive probation without a recommendation from the probation officer. *State v. Woodruff*, 196 Ariz. 359, 360, 997 P.2d 544, 545 (App. Div. 1 2000). A defendant on standard probation may be reinstated to intensive probation after violating probation by committing a new offense. *Id*. at 362, 997 P.2d at 547.

10. Live at Home with Parents, Curfew

The trial court acted properly in imposing probation conditions which required the defendant to: (1) live with his parents (2) not stay out past 10:00 p.m. for a period of eight months and (3) continue his education and seek employment. The conditions contributed to both appellant's rehabilitation and to the protection of the public because "they provide[d] for a modicum of supervision over [the defendant's] activities and [were] intended both to prevent future minimal activity and to facilitate [the defendant's] entry into a law-abiding society." *State v. Donovan*, 116 Ariz. 209, 212, 568 P.2d 1107 (App. Div. 2 1977).

11. Juveniles

The juvenile court may place juveniles on probation under A.R.S. § 8-241(A)(2)(a) and as a condition of probation require that the juvenile spend six weekends in juvenile detention. *See In the Matter of Appeal in Pima County Juvenile Action No. J-20705-3*, 133 Ariz. 296, 650 P.2d 1278 (App. Div. 2 1982).

B. Written Copy Requirement

Imposed probation conditions regulations must be set forth in writing and a copy of those conditions must be given to the probationer. *See* Rule 27.1. The only exception is defendant's probation may be revoked for breaking the law. A good explanation of this rule is set forth in *State v. Acosta*, 25 Ariz.App. 44, 540 P.2d 1263 (App. Div. 2 1975).

> Rule 27.1 does not require ... that a probationer be furnished with a copy of a written prohibition against violation of laws. The purpose of Rule 27.1 as to written conditions and regulations is to apprise a probationer of additional conditions which might be grounds for revocation other than the general conditions enumerated in A.R.S. § [13-901, 902 and 903, formerly 1657]. Rule 27.1 permits the sentencing court to impose on a probationer such conditions as will promote rehabilitation. Also, the probation officer may impose regulations consistent with the conditions to aid in implementing them. It is these special conditions and regulations that must be in writing and furnished to the probationer so that, as we said in *Heasley*: '...he cannot later be heard to say that he did not understand and concomitantly will be protected from arbitrary action on the part of probation officers.'[23 Ariz. App. 345,533 P.2d 556, 558(1975).]

Id. at 45, 540 P.2d at 1264. Although not a requirement, the comment to Rule 27.1 notes that the usual practice in Pima and Maricopa County superior courts is to impose the leading of a law-abiding life as a condition of probation along with three other routine conditions. See Rule 27.1, comment.

Unless the defendant broke the law again, a court may not revoke a person's probation for violation of a probation condition if that person did not receive a written copy of that condition. *See State v. Carvajal*, 147 Ariz. 307, 709 P.2d 1367 (App. Div. 1 1985). This is true even when the probationer admits he received an oral order from his probation officer. *State v. Robinson*, 177 Ariz. 543, 543-45, 869 P.2d 1196, 1197-98 (1994).

"Nothing in our statutes or rules, however, suggests that the failure to provide [a] probationer written conditions invalidates the probation." *State v. Stotts*, 144 Ariz. 72, 78, 695 P.2d 1110, 1116 (1985)(emphasis added). Also, probation might still be revoked even though the probationer did not receive a written copy of probation conditions at the instant probation was imposed. *See id.*

In *Stotts*, when the defendant was being charged, it was discovered that he was on parole in another state. The Arizona court suspended sentence and imposed probation. The probation contained a condition requiring the defendant to return to the other state and when the term of parole expired there, he was to return to Arizona in order to serve out his probation here. The defendant never received a copy of the probation conditions before he was returned to the other state to complete the parole. When the parole was about to expire, the two states made a pact which permitted the defendant to remain in the one state with the requirement that he follow the probation conditions which Arizona was to impose on him. The defendant signed the document for this procedure and later signed other documents which stated the various conditions imposed in his interstate probation. The defendant subsequently violated his probation and the probation was revoked. On appeal, the Arizona Supreme Court found that the defendant had received adequate notice:

> Though we emphasize that all probationers should receive written conditions at the time probation is imposed, we do not find the failure to do so in this case invalidated the probation revocation. A combination of four factors justifies this conclusion: first, though appellant's original 'unwritten probation' was, upon imposition, unenforceable by revocation, it was valid; second, the subsequent furnishing with appellant of written conditions and his signing of those conditions cured the probation's unenforceability; third, the subsequent written conditions were not more burdensome than unwritten conditions; and, fourth, there were no due process violations in basing revocation upon the subsequent written conditions.... [However,] had appellant violated one of the terms of his probation prior to receiving written conditions, the state could not have revoked the probation.

Id. at 78, 695 P.2d at 1116.

Rule 27 does not specify, and the case law is unclear, whether a probationer must receive a copy of the written probation terms or conditions upon being reinstated to probation. In *State v. Hadley,* 114 Ariz. 86, 559 P.2d 206 (App. Div. 1 1977), the court evaded this question when the probationer argued that the court could not revoke his probation for a probation violation since he had not received written notice of the probation conditions when the court reinstated probation. (He did receive a copy at the original sentencing.) The court held that, in this case, it was not very relevant whether the probationer received written notice of the conditions when he was reinstated to probation since the defendant's probation was being revoked for violation of a state law. Furthermore, case law had held that a probationer was not entitled to a written prohibition against a violation of the laws.

Nevertheless, because Rule 27.3 provides that the defendant must be given a written copy of any modification or clarification of the probation conditions, one could reasonably argue that a reinstatement

of probation is a modification that would require the court to give the defendant a written copy of probation terms. Therefore, the best and safest practice is to give the defendant a written copy and avoid an appellate issue.

Defendant was given adequate notice of probation conditions where the same conditions were imposed at a reinstatement of probation and the court had asked the probationer if he had a copy of those conditions, to which he answered. *State v. Vindiola,* 115 Ariz. 424, 565 P.2d 1285 (1977).

If it is not quite clear that a probationer received a written copy, a court may find that the probationer received a copy of the probation conditions imposed based upon circumstantial evidence alone. *Stotts, supra*. (probationer was found to have had adequate notice of conditions where the probation officer testified that he probably followed his normal procedure of giving the probationer a copy of the conditions after the probationer had signed them); Cf. *State v. Watkins,* 125 Ariz. 570, 611 P.2d 923 (1980) (defendant was found to have received written notice of the probation condition where record clearly showed his signature on the probation officer's implementation form).

Written notice need not be given to a probationer every time a probation officer requests a probationer to report to him/her. Such oral instructions "may be given from time to time during the entire period of probation." *State v. Salazar,* 112 Ariz. 355, 357, 541 P.2d 1157, 1159 (1975); *State v. Alves,* 174 Ariz. 504, 851 P.2d 129 (App. Div. 1 1992)(probation officer is not required to provide probationer with a written copy of the rules and regulations of any program in which he/she is required to participate). See also *State v. Robinson,* 177 Ariz. 543, 545 n.4, 869 P.2d 1196, 1198 n.4 (1994)(oral orders are not precluded unless revocation is sought for their violation).

For further instruction regarding written notice and revocation see the subsection Rule 27.7 Revocation of Probation.

IV. Rule 27.2: Intercounty Transfers

Rule 27.2 applies to probationers who reside or will reside in a county other than the one in which he/she committed the offense. A probationer does not have the right to probation supervision in another county; such placement is considered a courtesy by the receiving county.

In addition to the process outlined in Rule 27.2, Arizona Code of Judicial Administration § 6-211 sets forth in greater detail the eligibility requirements, investigation procedures, reporting requirements, standards or supervision, probation violation procedures for intercounty transfers.

A. Obtaining Approval for Transfer

The probationer must get approval from the court that placed the defendant on probation, the prosecutor, the sending and receiving probation departments, and the receiving county court before the probation can be transferred. Rule 27.2(a),(b)(1). Additionally, the victim must be given notice of the proposed transfer and an opportunity to be heard on the matter. Rule 27.2(b)(1).

Before an intercounty probation transfer can be approved, the sending county must first determine whether the receiving county can supervise the defendant in accordance with the terms

and conditions originally imposed by the court. Rule 27.2(a)(1). If the receiving county cannot, the court may hold a hearing on the issue and amend the probation terms to allow transfer to the receiving county. Rule 27.2(a)(2). The court in the sending county retains jurisdiction over the defendant, any probation violation proceeding and the collection of financial obligations. Rule 27.2(a)(3).

B. Transferring Jurisdiction

Once the transfer is approved, the sending county's clerk of the court must certify the financial record of all the probationer's financial obligations in the case and forward that record, along with the original court file, to the receiving county's clerk of the court within 20 days of the transfer order. Rule 27.2(b)(2). Upon receipt of the court file, the receiving county's clerk must sign the transmittal letter and return it to the sending county for proof of successful file transfer. *Id*.

The sending county's probation department must send copies of their file and "any other pertinent information" to the chief probation officer in the receiving county. Rule 27.2(b)(3). Because there is no case law yet interpreting this rule, it is unclear what constitutes pertinent information for purposes of intercounty transfers. Nevertheless, the transfer is complete once the probationer reports to his probation officer in the receiving jurisdiction for the first time. Until then, he/she remains under the jurisdiction of the sending county.

C. Receiving County Obligations

After the transfer is complete, the receiving court assumes jurisdiction of the case and has all the powers of the sentencing court, including, but not limited to, the restoration of civil rights. Rule 27.2(b)(4). However, the receiving court's continuing jurisdiction over the case may change if an appellate court orders remand or modification of a conviction or sentence. If the case is remanded for a new trial, the receiving county must transfer jurisdiction back to the county of original jurisdiction. Rule 27.2(b)(6). In any other event, the receiving county has the option to retain jurisdiction, transfer the case back to the original court for all purposes, or transfer the case back to the original court for all purposes except probation supervision and revocation. *Id*.

So long as the receiving county retains jurisdiction over the probationer's supervision, that county's court is responsible for the collection of the probationer's financial obligations, which must then be dispersed to the sending county. Rule 27.2(b)(5). If necessary, the chief probation officer may request a review hearing to affirm or modify the terms and conditions of probation to include fee and restitution payments. Rule 27.2(b)(4).

D. Remand to Original Jurisdiction

If the probationer's case is remanded to the trial court for a new trial, the receiving county clerk is required to return the original court file and entire record to the county clerk in the original jurisdiction within 20 days of the remand order. Rule 27.2(b)(7). Upon receipt of the file, the original county clerk must sign the transmittal letter and return it to the receiving county court clerk. *Id.* Similarly, the receiving county's probation department must send copies of the file and

"any other pertinent information" to original court. Rule 27.2(b)(8).

V. Rule 27.3: Modification and Clarification of Conditions and Regulations

In general, Rule 27.3 is intended to

> protect the probationer from arbitrary conditions or regulations, to provide a formal way in which a probationer may have ambiguous conditions and regulations clarified short of violation and revocation proceedings, to provide the probation process with more flexibility (cite omitted), and, on the suggestion of probation officials, to provide a way in which the authority of the court may be used to prevent a revocation when a probationer seems to be slipping toward that ultimate sanction.

Rule 27.3, comment.

A. Authority to Modify and Clarify

Rule 27.3 gives to the party that imposed the probation condition(s) (either the sentencing court or probation officer) the authority to make any clarifications or modifications in the conditions of probation which are necessary or requested. See Rule 27.3. Although a sentencing court is authorized to modify any of the probation conditions that a probation officer has imposed, a probation officer is not authorized to modify any of the probation conditions which the sentencing court imposed. See *id.*; *State v. Fox,* 153 Ariz. 493, 494, 738 P.2d 364, 365 (App. Div. 2 1986). Under Rule 27.1, an officer is authorized to impose terms that implement any conditions imposed by the court.

The rule suggests that the sentencing court is granted much discretion when modifying terms of probation. Nevertheless, this discretionary power to modify is restricted by such statutory provisions as A.R.S. §§ 13-901 to 13-903, and Rule 27. *See Green v. Superior Court, Cochise County,* 132 Ariz. 468, 471, 647 P.2d 166, 169 (1982). The court is also limited to the terms of the plea agreement. If, for example, the parties stipulate that the defendant serve a year in jail as a condition of probation, the court may not impose the sentence and then unilaterally modify the jail term without notifying both parties and giving them an opportunity to respond. *State v. Rutherford*, 154 Ariz. 486, 744 P.2d 13 (App. Div.1 1987).

This discretion is also limited by the rule of reasonableness. That is, "a reasonable basis must exist in order for the trial judge to either modify or revoke the terms of probation." *Burton v. Superior Court, Maricopa County,* 27 Ariz.App. 797, 800, 558 P.2d 992, 995 (App. Div. 1 1974). Furthermore, there are constitutional due process considerations which impose limitations. *See*, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973); *State v. Rivera,* 116 Ariz. 449, 569 P.2d 1347 (1977); *State v. Jameson,* 112 Ariz. 315, 541 P.2d 912 (1975).

B. Petition for Modification or Clarification

1. Request by Probationer or Probation Officer

Prior to absolute discharge, under Rule 27.3 a probationer or probation officer may request the sentencing court to make a modification or clarification of any probation condition or regulation which is part of the probationer's probation. The sentencing court may then conduct a hearing on the request. See Rule 27.3. The court cannot modify the terms of probation or designate an undesignated offense a felony

without giving the probationer notice of the request and an opportunity to be heard. *State v. Benson*, 176 Ariz. 281, 860 P.2d 1334 (App. Div.1 1993).

Thus, if a probationer questions the clarity or requirements of a term or terms of his/her probation, the appropriate action (as set forth in rule 27.3) is for the probationer to petition to the sentencing court so it may modify or clarify the conditions in question at a special hearing. *See State v. Stotts,* 144 Ariz. 72, 695 P.2d 1110 (1985). In *Stotts,* the defendant's probation was properly revoked when he left a rehabilitation center his probation terms required him to attend. The defendant argued that his probation should not be revoked because he had an alternate "good faith" plan. The court stated that the revocation was justified because the alternate plan was not only unrealistic, but the defendant quit the mandated program without properly moving for a modification of the probation condition under Rule 27.3.

2. Request by Prosecutor

A prosecutor is also permitted to petition for a modification of the conditions of probation. *See Burton v. Superior Court, Maricopa County,* 27 Ariz App. 797, 799, 558 P.2d 992, 994 (App. Div. 1 1977)("The manner in which information [regarding a probationer] is brought to the attention of the sentencing court is not limited by [Rule 27.3]....").

The moment when it will be most likely for a prosecutor to make a petition to modify is when a court decides not to revoke a person's probation even though he/she violated the probation. In these circumstances, the prosecutor's tactic should be to persuade the court that the person's probation should at least be modified to be more stringent. Therefore, although the fight to revoke the probation might be lost, there be a chance to give greater protections to society by imposing stricter probation conditions.

Note: A court's option and power to modify a probation, rather than revoke, is granted in Rule 27.3, comment. It is also a good example of the wide discretion a trial judge has in revoking or modifying a probation. Cf. *Bruton v Superior Court Maricopa County, supra.*

C. Reasons for Modification

Conditions of a probation may be modified if the probationer requests a modification. Probation conditions might also be modified if it appears that the probationer may be acting in such a way that his/her probation may soon be revoked. See Rule 27.3, comment. But whatever the case, this "wide discretion to modify . . . probation is, of course, limited by the rule of reasonableness." *Burton v. Superior Court, Maricopa County,* 27 Ariz.App. 797, 800, 558 P.2d 992, 995 (App. Div. 1 1977). However, the court may also "modify probation for reasons that may not otherwise warrant revocation of probation." *Green v. Superior Court, Cochise County,* 132 Ariz. 468, 470, 647 P.2d 166, 168 (1982). For example, the court may modify conditions of probation to order restitution, even if the victim failed to timely request restitution. *State v. Contreras*, 180 Ariz. 450, 885 P.2d 138 (App. Div. 1 1997)(holding that a court's obligation to order restitution is not excused if the victim declines to request it because the objectives of mandatory restitution include not only reparation to the victim, but also rehabilitation of the defendant).

D. Written Copy Requirement

"A written copy of any modification or clarification shall be given to the probationer." Rule 27.3. However, "[a]n oral modification can go into effect immediately, but before it is reduced to writing and given to the

probationer it cannot serve as a basis for revoking probation." Rule 27.3 comment. *See also* Rule 27.8(c)(2).

E. Timeliness

As long as a petition for modification is made sometime prior to absolute discharge, it is deemed timely and there are no other time limits to when a probationer may petition for a modification or clarification. *See also State v. Young*, 137 Ariz. 365, 366, 670 P.2d 1189, 1190 (App. Div. 1 1983) (defendant's petition for modification was found to be timely, and therefore, he could object to the probation condition (restitution) imposed even though he petitioned 24 days after he had signed the terms of his probation).

VI. Rule 27.4: Early Termination of Probation

Termination of probation differs from revocation in that termination is the ending of the probationary term due to time expiring on the term, good behavior, etc. On the other hand, a revocation is an early ending and taking away of the "grace period" of probation because the probationer violated some condition. Rule 27.4 covers early termination of probation.

A defendant's probation can be unsuccessfully terminated under A.R.S. § 13-901(E) if " (1) justice will be served; and (2) the conduct of the defendant indicates rehabilitation." *State v. Lewis*, 224 Ariz. 512, ¶ 15, 233 P.3d 625 (App. Div. 1 2010).

Rule 27.4 gives a sentencing court the power to terminate a person's probation at any time during the term of probation, based upon a motion of the probation officer or on the court's own initiative. Rule 27.4 requires that the court inform the prosecutor of its intentions, so that the prosecutor has the opportunity to oppose the early termination. See Rule 27.4(a) and Rule 27.4, comment. The court may reduce the term of supervised probation for earned time credit as provided by A.R.S. § 13-901. Rule 27.4(b).

VII. Rule 27.5: Order and Notice of Discharge

Once the time period expires or an early termination of a term of probation occurs, the court is required to order the absolute discharge of the probationer when the probation originates in superior court. Rule 27.5(a). In contrast, a probationer in a limited jurisdiction court is automatically discharged from probation at the end of his/her probation term. Rule 27.5(b).

In either court, the probationer shall promptly be provided with a copy of the discharge order upon request. Rule 27.5. In superior court, the clerk of the court is charged with this function and must provide a certified copy. Rule 27.5(a). In limited jurisdiction courts, the court is required to provide a copy of the order, but the rule does not require that it be a certified copy. Rule 27.5(b). This provides a probationer with a formal document which proves that he has completed his term. Rule 27.5, comment.

NOTE: Defendant's absence from the jurisdiction or from required supervision stops the running of the probationary period. A.R.S. § 13-903(C). If defendant leaves supervision and reappears after probation would have ended he is still on probation, and will be on probation until he has completed whatever time remained when he left.

VIII. Rule 27.6: Initiation of Revocation Proceedings; Securing the Probationer's Presence; Notice

Revoking a person's probation begins with two procedures: (1) filing a petition to revoke, and then (2) bringing the probationer before the court. Obviously, these procedures are to be used when the probationer can be found. *State v. Lovell*, 123 Ariz. 467, 469, 600 P.2d 1099, 1101 (1979). If he/she cannot be found, refer to Rule 27.10.

A. Petition To Revoke

A petition to revoke probation may be filed with the sentencing court if there is reasonable cause to believe the probationer violated a written condition or regulation of probation. Either the probation officer responsible for the probationer's conduct or the prosecutor of the jurisdiction in which the probationer was convicted may file the petition. See Rule 27.6(a). Filing the petition to revoke stops the running of the probation period. A.R.S. § 13-903(C); *State v. Johnson*, 182 Ariz. 73, 893 P.2d 73 (App. Div. 1 1995).

A petition should fully and clearly set out the alleged probation violation so that the probationer will be informed in writing of the claims against him; however, the allegations need not be as particular and detailed as required in an indictment. *State v. Turnbull*, 114 Ariz. 289, 560 P.2d 807 (App. Div. 1 1977); Cf. *State v. Bates*, 111 Ariz. 202, 526 P.2d 1054 (1974) (ample notice of alleged violation was given to probationer where the petition was attached to warrant).

Although, as a general rule, the Arizona courts prefer that a written petition for a revocation be filed in conformance with Rule 27.6(a), there is some flexibility in the procedures for probation revocation. For example, in *State v. Stotts*, 144 Ariz. 72, 695 P.2d 1110 (1985), the Arizona Supreme Court held that although the petition to revoke probation did not specify the condition number and regulation letter which the probationer was being accused of violating, the defendant did receive adequate notice of the grounds for revocation because the petition detailed the reasons for revocation (for e.g., defendant's dishonesty and impulsive sexual behavior, etc.). For more examples see the following:

State v. Turnbull, 114 Ariz. 289, 560 P.2d 807 (App. Div. 1 1977). The petition to revoke probation gave adequate notice to defendant of grounds for revocation even though the petition did not mention the instance of narcotics use that the defendant had admitted to his probation officer, but instead mentioned a urinalysis test to substantiate the violation.

State v. Robledo, 116 Ariz. 346, 549 P.2d 288 (App. Div. 1 1977). Here the petition to revoke defendant's probation was merely technical and not prejudicial to defendant even though it made reference to the conditions of defendant's first probation instead of the conditions of defendant's reinstated (second) probation.

The Arizona Court of Appeals has also held that when a probation is revoked because of a subsequent conviction, the importance of the probationer receiving written notice of the factual allegations is not as significant. *State v. Tubbs*, 116 Ariz. 246, 568 P.2d 1144 (App. Div. 1 1977). The defendant in *Tubbs* argued that his probation could not be revoked on grounds that he had been convicted of a subsequent crime, because no petition had been filed as required by Rule 27.6(a). Although the Court of Appeals suggested that it would have been better practice to follow Rule 27.6(a) and to have filed a written petition, the court found that "when a probationer has been convicted of a subsequent offense,

written notice of the factual allegations has already been provided in the prosecution of that offense." *Id*. at 249, 568 P.2d at 1147. (Refer to *Tubbs* also for a list of cases where technical irregularities of other Rule 27 procedures have been waived because no objection was made and the defendant was not prejudiced.)

Finally, in *Bates, supra,* (notice adequate where petition attached to warrant), the sufficiency of the original notice was not altered by the fact that a plea bargain may have later been made pertaining to the charges arising from the alleged probation violation.

1. Grounds for Revocation

As previously stated, before a petition to revoke probation may be filed there must be reasonable cause to believe that the probationer violated a term of his probation. "This reason is established by a preponderance of the evidence." *State v. Bates*, 111 Ariz. 202, 204, 526 P.2d 1054, 1056 (1974) (internal citation omitted).

A probation officer may choose to file a petition for revocation based upon any violation of a term of probation: *State v. Watkins*, 125 Ariz. 570, 611 P.2d 923 (1980); (failure to complete a drug rehabilitation program); *State v. Herro*, 120 Ariz. 604, 587 P.2d 1181 (1978); (failure to complete a vocational program); *State v. Canady,* 124 Ariz. 599, 606 P.2d 815 (1980); (failure to return to Arizona after serving time in another state); *State v. Morales*, 137 Ariz. 67, 668 P.2d 910 (App. Div. 2 1983) (associating with undesirable persons); *State v. Velasquez*, 122 Ariz. 81, 593 P.2d 304 (App. Div. 1 1979); (failure to file monthly probation reports); *State v. Stapley*, 167 Ariz. 462, 808 P.2d 347 (App. Div. 2 1991)(willful failure to pay anything toward restitution).

Take note that whether specific criminal intent is an essential element of a probation violation is unclear. *State v. Watkins,* 125 Ariz. 570, 611 P.2d 923 (1980). In *Watkins,* the court did not reach this question but instead stated that the defendant's point, of intent not being necessary, was not well taken.

2. Subsequent Conviction

Violation of a specifically stated probation condition is not the only grounds for revoking a probation. Conviction of a criminal offense is also grounds for revocation, *State v. Smith*, 116 Ariz. 387, 390, 569 P.2d 817,820 (1977), even if probationer is awaiting appellate review of that conviction. *State v. Barnett*, 112 Ariz. 212, 213, 540 P.2d 684, 685 (1975).

See section X. “Rule 27.8: Revocation of Probation”, D. “Disposition Due to Subsequent Offense”, *infra*.

3. Dismissal of Subsequent Charges Does Not Bar Revocation

Probation may still be revoked even if the trial court dismisses the criminal charges. *See State v. Jameson*, 112 Ariz. 315, 318, 541 P.2d 912, 915 (1975) (revocation not precluded by the doctrine of collateral estoppel where criminal charge dismissed). Nor is revocation prohibited if a probationer is convicted for fewer charges or for a lesser included offense of the crime charged. *State v. Williams*, 122 Ariz. 146, 150, 593 P.2d 896, 900 (1979) (revocation proper even though defendant had been found guilty of only one aggravated assault rather than the two he had been charged with); *State v. Astorqa*, 26 Ariz.App. 260, 262, 547 P.2d 1060, 1062 (App. Div. 2 1976) (no error occurred when defendant's probation was revoked for possession of heroin for sale even though the defendant was convicted of a lesser

offense, i.e. simple possession).

However, a person's probation may not be revoked on the grounds that the defendant admitted to an offense (adultery) unless the defendant was made aware of his rights under Rule 27.9. *State v. Lynch,* 115 Ariz. 19, 22, 562 P.2d 1386, 1389 (App. Div. 1 1977); *See also State v. Fisher,* 21 Ariz.App. 604, 522 P.2d 560 (App. Div. 1 1974) (probation could not be revoked on grounds that probationer was publicly intoxicated). Remember, with the exception of a criminal offense, only a violation of written conditions is a sufficient basis for revocation. Violation of oral terms is not a ground to revoke probation. *State v. Espinoza,* 113 Ariz. 360, 555 P.2d 318 (1976).

B. Summons/Warrant To Secure Probationer's Presence

There are two ways in which the sentencing court may obtain the probationer's presence when a petition to revoke has been filed: (1) the court may issue a summons directing the probationer to appear for a revocation hearing, or (2) it may issue a warrant, based on probable cause, for the probationer's arrest. Rule 27.6(b); *See also* A.R.S. § 13-901(C). However, A.R.S. § 13-901(D) also permits a probation officer to arrest a person without the aid of a warrant. It is permissible and possible for a probation officer to make a warrantless arrest of a probationer by placing an "oral hold" on a probationer through an officer of the law. *Padilla v. Superior Court of Arizona In and For Coconino County,* 133 Ariz. 488, 490, 652 P.2d 561, 563 (App. Div. 1 1982).

The "oral hold" procedure may be followed only if the arrested probationer is informed of the authority the officer of the law has, is given the cause for the arrest, and the initial appearance is made without unreasonable delay. *Id*. at 490-491. The *Padilla* court did add that the better practice, in such a situation is for the probationer to be personally interviewed and assessed of his need to be detained by the appropriate probation officer rather than an officer of the law.

IX. Rule 27.7: Initial Appearance After Arrest

Rule 27.7 sets forth the procedures following an arrest of a probationer pursuant to a warrant. It states: "When a probationer is arrested on a warrant issued under Rule 27.5(b), his or her probation officer, if any, shall be notified immediately, and the probationer shall be taken without unreasonable delay before the court from which the warrant was issued[.]" That judge shall then "advise the probationer of his rights to counsel under Rule 6, inform the probationer that any statement he or she makes prior to the hearing may be used against him or her, [and] set the date of the revocation hearing[.]" When all that is completed, the judge may then determine whether to release the probationer, and on what terms, pursuant to Rule 7.2(c). See Rule 27.7.

Note: The rule mistakenly cites Rule 27.5(b) as the authority for the warrant. Rule 27.5 was renumbered in 2005 to Rule 27.6, but the text of Rule 27.7 did not reflect the change.

A. Unreasonable Delay

A probationer must be taken before the judge who issued the warrant without unreasonable delay for an initial appearance. "Unreasonable delay" has been interpreted as 24 hours under Rule 4.1(a). *State v. Lee*, 27 Ariz.App. 294, 554 P.2d 890 (App. Div. 1 1976); *See also State v. Hopson,* 112 Ariz. 497, 543 P.2d 1126 (1975).

However, in *Padilla v. Superior Court of Arizona In and For Coconino County,* 133 Ariz. 488, 652 P.2d 561 (App. Div. 1 1982), the probationer did not receive an initial appearance until six days following his arrest. The Arizona Court of Appeals held that, while this delay was unreasonable, it would not say "that under all conceivable circumstances an initial appearance for a probation must be held within 24 hours." *Id*. at 490. In a footnote, the court went on to point out that Rule 4.1(a) (requiring a person to be immediately released if there has been a failure to take that person before a magistrate within 24 hours of his arrest) is superseded by the probation rules. "We think, however, that where the arrest is for a probation violation the rules applying to probation matters are the ones that must be followed." *Id*. at 490, n.1, 652 P.2d at 563, n.1.

B. Informing Probationer of his Rights

There was no prejudice to probationer where the court failed to inform him at his initial appearance, under Rule 27.7, "that any statement he made prior to the hearing might be used against him." The probationer did not make any statement other than a denial of any probation violation. *State v. Astorga,* 26 Ariz.App. 260, 262, 547 P.2d 1060, 1062 (App. Div. 2 1976). *But see State v. Tash,* 23 Ariz.App. 299 532 P.2d 874 (App. Div. 1 1975) (totality of errors, including a failure to inform, required a reversal).

C. Release of Probationer

Rule 27.7 places the control of release of probationers under Rule 7.2. Rule 7.2 states that after conviction a person may not be released unless the person shows there are reasonable grounds to believe the conviction will be overturned. If defendant fails to meet that burden, the defendant must remain in custody. *See State v. Arnold,* 24 Ariz.App. 529, 540 P.2d 148 (App. Div. 2 1975).

X. Rule 27.8: Revocation of Probation

The sentencing court's power to revoke probation is derived exclusively from statute. Cf. Arizona Revised Statutes, Title 13, Chapter 9. But the procedure for revocation is set forth in Rule 27.8.

A. Revocation Arraignment

The purpose of Rule 27.8(a) is to protect probationers from lengthy, unwarranted incarceration. *See State v. Chambers,* 23 Ariz.App. 530, 532, 534 P.2d 461, 463 (App. Div. 1 1975). Under 27.8(a)(1), a revocation arraignment must be held within seven days from the date of service of the warrant. *See State v. Lee,* 27 Ariz.App. 294, 554 P.2d 890 (App. Div. 1 1976). However, a revocation of probation will not be reversed for an untimely revocation arraignment unless it can be shown that the probationer was prejudiced by the delayed revocation arraignment. *Id*.

At the revocation arraignment, the probationer must be informed of the alleged violations which form the basis of the revocation action. Rule 27.8(a)(2). *See State v. Zajac,* 26 Ariz.App. 593, 550 P.2d 639 (App. Div. 1 1976) (revocation of defendant's probation was reversed due to trial court's failure to comply with this rule). However, a revocation of probation will not always be reversed for a Rule 27.8(a)(2) violation. *See State v. Stotts,* 144 Ariz. 72, 695 P.2d 1110 (1985) (judge's failure to meet the Rule 27.8(a)(2) requirement was mere technical error, not fundamental); *State v. Williams,* 122 Ariz. 146, 593 P.2d 986 (1979) (reversal of revocation not required for failure to notify probationer of alleged violations because probationer was notified of other violations and those were adequate grounds for revocation); *State v. Rivera,* 116 Ariz. 449, 569 P.2d 1347 (1977) (*See Williams, supra*); *State v.*

Espinoza, 113 Ariz. 360, 555 P.2d 318 (1976) (revocation of probation proper even though revocation was based on violation of two additional conditions of which probationer had not been informed).

After the probationer has been notified of each alleged violation of probation, the probationer is required to admit or deny each allegation. Rule 27.8(a)(2).

The next step is for the judge to make a determination about whether there was a violation of a probation condition. If no violation is found, the petition to revoke should be dismissed. However, if the judge determines that the allegation is well-grounded, a violation hearing should be held to determine whether there was in fact a violation and whether probation should be revoked. *State v. Settle,* 20 Ariz.App. 283, 287, 512 P.2d 46, 50 (App. Div. 1 1973). Either a denial by the probationer of the alleged violation or a refusal by the court to accept the probationer's admission is sufficient basis to proceed to a violation hearing. The violation hearing should then be set by the court, unless the parties stipulate to an immediate hearing. Rule 27.8(a)(3).

This procedure of holding a preliminary hearing as well as a final revocation hearing (i.e. having a bifurcated hearing) is required by the guidelines of the United States Supreme Court. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973). If these guidelines are not followed, the revocation may be set aside. *State v. Hughes*, 22 Ariz.App. 19, 522 P.2d 780 (App. Div. 1 1974). However, the Court of Appeals has held that a later hearing correcting the errors of an earlier *Gagnon* hearing satisfies due process and will not warrant a reversal. *State v. Baylis*, 27 Ariz.App. 222, 553 P.2d 675 (App. Div. 1 1976).

The defendant has a constitutional right to present mitigating evidence prior to probation revocation under *Scarpelli, supra* and *Black v. Romano,* 471 U.S. 606, 105 S.Ct. 2254 (1985). *State v. Talton,* 153 Ariz. 433, 734 P.2d 409 (App. Div. 1 1987). If a defendant admits a probation violation and requests a chance to mitigate, a second hearing is necessary.

B. Violation Hearing

The purpose of the violation hearing is to determine whether a probationer violated a written condition or regulation of probation. See Rule 27.8(c). The hearing is required to be held no less than 7 and no more than 20 days after the revocation arraignment. See 27.8(b)(1). However, in those cases where the 20-day period has been exceeded and questioned by the probationer, the trial court must "examine the particular case before it and determine whether the delay was reasonable and whether the [probationer] was prejudiced by delay." *State v. Williams*, 123 Ariz. 112, 116, 597 P.2d 1015, 1019 (App. Div. 1 1979). A revocation will not be reversed if the delay did not result in prejudice. *See State v. Baylis,* 27 Ariz.App. 222, 553 P.2d 675 (App. Div. 1 1976); *State v. Belcher,* 111 Ariz. 580, 535 P.2d 1297 (1975); and *State v. Chambers,* 23 Ariz.App. 530, 534 P.2d 461 (App. Div. 1 1975).

If a defendant is arrested on new charges, and a motion to revoke is filed, the court should not wait for the trial results, even in defendant wants to. The revocation hearing should be held within the Rule 27 time limits. *See State v. Fahringer,* 136 Ariz. 414, 666 P.2d 514 (App. Div. 2 1983).

A delay in a violation hearing is also permitted if the probationer requests it in writing or in open court on the record. See Rule 27.8(b)(1). Furthermore, case law seems to suggest that "technical" problems will not make a delay prejudicial. *See State v. Gray,* 115 Ariz. 150, 564 P.2d 101 (App. Div. 2 1977) (revocation of probation need not be reversed due to delay since delay involved "a problem of logistics

between superior court hearings in different countries"); *State v. Haunte,* 111 Ariz. 236, 527 P.2d 281 (1974) (delay not prejudicial because delay was for "cause" and for no more than eight days); *State v. Long,* 148 Ariz. 295, 714 P.2d 465 (App. Div. 2 1986) (delay not prejudicial where delay was a result of probationer's request for new counsel and delay arose while new counsel familiarized himself with the case). Part (2) of Rule 27.8(b) requires that the probationer be present at the hearing. If the probationer has not been located, follow Rule 27.10.

1. Evidence for Violation Hearings

Rule 27.8(b)(3) discusses evidence presented in violation hearings.

a. Establishing The Violation

Revocation hearings are more flexible than criminal trials in that the rules of evidence do not strictly apply. *State v. Smith,* 112 Ariz. 416, 542 P.2d 1115 (1975); *State v. Bates,* 111 Ariz. 202, 526 P.2d 1054 (1974). According to Rule 27.8(b)(3), the standard of proof to establish a violation is the civil standard, i.e. a violation must be established by a preponderance of the evidence. *State v. Fisher,* 21 Ariz.App. 604, 522 P.2d 560 (App. Div. 1 1974). *See also In the Matter of the Appeal in Maricopa County, Juvenile Action No. J-72918-S,* 111 Ariz. 135, 524 P.2d 1310 (1974) (this standard also applies in probation revocation hearings of juveniles).

Evidence to establish or refute the violation may be presented by each party. In addition, each party has the right to cross-examine all witnesses introduced by the opposition. *State v. Hopson,* 112 Ariz. 497, 543 P.2d 1126 (1975). *See also State v. Jameson,* 112 Ariz. 315, 541 P.2d 912 (1975) (no abuse of discretion occurred when the trial court heard the witness detective's testimony regarding the conversations with the probationer who was absent from the probation proceeding).

b. Reliable Hearsay

All reliable evidence, except that which is legally privileged, is admissible at the violation hearing. Reliable hearsay is included among the evidence admissible to show a violation; in fact, probation can be revoked exclusively on hearsay testimony. *State v. Valenzuela,* 116 Ariz. 61, 63, 567 P.2d 1190, 1192 (1970); *State v. Smith,* 112 Ariz. 416, 542 P.2d 1115 (1975); *State v. Belcher,* 111 Ariz. 580, 535 P.2d 1297 (1975).

The admissibility of hearsay testimony depends on whether it is reliable. In *State v. Tulipane,* 122 Ariz. 557, 596 P.2d 695 (1979), the Arizona Supreme Court applied the reliability standard of Rule 803(24), Arizona Rules of Evidence, to define reliable hearsay. "Reliable ... is synonymous with trustworthy and thus connotes that type of dependency which underlies the generally recognized exceptions to the hearsay rule." *State v. Stotts,* 144 Ariz. 72, 82, 695 P.2d 1110, 1120 (1985); and *State v. Brown,* 23 Ariz.App. 225, 532 P.2d 167 (App. Div. 1 1975). The trustworthiness of an out-of-court statement depends on whether the circumstances surrounding the statement provide a reasonable assurance of credibility. *State v. Portis,* 187 Ariz. 336, 339, 929 P.2d 687, 690 (App. Div. 1 1996).

While the traditional exceptions provide guidelines for what is and is not trustworthy, the use of hearsay is not strictly limited to those exceptions. *State v. Flores,* 26 Ariz.App. 400, 549 P.2d 180 (App. Div. 1 1976). *See generally State v. Tulipane, supra* (polygraphs not admissible under hearsay in a probation revocation hearing, but lab reports are).

c. Lab Results and Reports

Oftentimes, the state will produce evidence regarding a violation of the probation condition prohibiting drug or alcohol use. Typically, such evidence does not come in the form of observational testimony, but through the presentation of blood, urinalysis or other laboratory analysis showing the presence of drugs or alcohol in the probationer's system. Lab reports are admissible as reliable hearsay to prove this in probation violation proceedings. *State v. Flores,* 26 Ariz.App. 400, 549 P.2d 180 (App. Div. 1 1976). Moreover, a probation officer's testimony about lab report results is also admissible. *State v. Snider*, 172 Ariz. 163, 164-65, 835 P.2d 495, 496-97 (App. Div. 1 1992).

However, although reliable hearsay about the test results is permissible, the state must still establish a reliable chain of custody between the urine sample and the test results in order to sufficiently establish that the sample came from the probationer. *State v. Portis*, 187 Ariz. 336, 338, 929 P.2d 687, 689 (App. Div. 1 1996). C.f. *State v. Carr*, 216 Ariz. 444, 446, 167 P.3d 131, 133 (App. Div. 2 2007)(probation officer's testimony was sufficient to establish chain of custody where he testified that he observed defendant urinate into cup, sealed and mailed it to lab for testing).

d. Hearsay and the Right to Confrontation

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), the Supreme Court abrogated the holding in *Ohio v. Roberts,* 448 U.S. 56 (1980), that permitted the admission on hearsay statements based on an adequate indicia of reliability. The Court held that the Confrontation Clause of the United States Constitution requires the state to show that the declarant was unavailable and the defense had an opportunity to cross-examine the witness before the witness' statement is allowed to be admitted at trial.

The Arizona Court of Appeals has held that the Crawford rule does not apply in probation violation hearings. *State v. Carr*, 216 Ariz. 444, 167 P.3d 131 (App. Div. 2 2007). Accordingly, any defense objection to a hearsay statement based on the Confrontation Clause should be overruled by the court.

e. Sufficiency of the Evidence

Once the admissibility of evidence has been determined, the next issue is whether the evidence is sufficient to establish a violation. Sufficiency is a function of the preponderance of the evidence standard. The courts must decide each case in light of the specific fact situation. The Arizona Supreme Court articulated the evidentiary standard in *State v. Smith*, 112 Ariz. 416, 542 P.2d 1115 (1975). It was enough for the trial court to have "reason to believe that the individual is violating the conditions of his probation or engaging in criminal practices" in order to revoke his probation. *See also State v. Baylis,* 27 Ariz.App. 222, 553 P.2d 675 (App. Div. 1 1976) (probation officer's testimony was sufficient to establish a violation).

Beyond this, very few guidelines have been provided for applying the evidentiary standard. Arizona courts have held, however, that the mere fact that conflicting evidence exists does not render it insufficient. *State v. Thomas*, 196 Ariz. 312, 313, 996 P.2d 113, 114 (App. Div. 2 1999); *State v. Rivera,* 116 Ariz. 449, 569 P.2d 1347 (1977); *State v. Espinoza,* 113 Ariz. 360, 555 P.2d 318 (1976). It is entirely within the discretion of the trial court to decide the issue of the sufficiency of evidence and such a decision will only be disturbed if it is arbitrary and unsupported by a reasonable theory of evidence. *State v. Watkins,* 125 Ariz. 570, 611 P.2d 923 (1980); *State v. Moore,* 125 Ariz. 305, 609 P.2d 575 (1980).

f. Admissibility of Statements and *Miranda* at Violation Hearings

Statements made by a probationer to his/her probation officer regarding crimes that the probationer committed during the term of his/her probation are admissible in a hearing to revoke probation, regardless of whether the probationer was read his/her *Miranda* rights. *State v. Rivera,* 116 Ariz. 449, 452, 569 P.2d 1347, 1350 (1977); *State v. Fimbres*, 108 Ariz. 430, 501 P.2d 14 (1972). *See generally Minnesota v. Murphy,* 465 U.S. 20, 104 S.Ct. 1136 (1984) (admissible in subsequent criminal prosecution).

The Arizona Supreme Court held that unwarned statements to police officers may not be used in the revocation case in chief. *State v. Smith,* 112 Ariz. 416, 420, 542 P.2d 1115, 1119 (1975). The continued validity of the case is open to question because since *Smith,* the Arizona Supreme Court has decided the Fourth Amendment exclusionary rule does not apply to probation revocation proceedings. *State v. Alfaro,* 127 Ariz. 578, 580, 623 P.2d 8, 10 (1980). Without the deterrence rationale denied in *Alfaro,* there seems little reason to exclude trustworthy and reliable evidence because *Miranda* was violated.

However, "*Miranda* must be followed before [a probationer's statements] to a probation officer concerning a new crime may be admitted at the trial for that new crime." (emphasis added) *State v. Magby,* 113 Ariz. 345, 349, 554 P.2d 1272, 1276 (1976). The continued validity of *Magby* is open to question, given the opposite decision in *Minnesota v. Murphy,* 465 U.S. 420, 104 S.Ct. 1136 (1984) (admissible in subsequent prosecution).

A defendant cannot have his probation revoked for invoking his privilege against self-incrimination. *State v. Eccles*, 179 Ariz. 226, 228, 877 P.2d 799, 801 (1994). To the extent he has lost the privilege on offenses for which he has been convicted, he must answer, even if his answers may be evidence of probation violations and result in revocation. *Id*.

2. The Exclusionary Rule and Violation Hearings

The Arizona Supreme Court has ruled that the exclusionary rule absolutely does not apply in probation revocation proceedings. *State v. Alfaro,* 127 Ariz. 578, 580, 623 P.2d 8, 10 (1980); *See also State v. Albe,* 148 Ariz. 87, 713 P.2d 288 (App. Div. 1 1985) (even though police officers allegedly violated the statutory "knock and announce" rule, defendant-probationer could not suppress evidence at probation revocation proceeding because exclusionary rule does not apply at such proceedings).

In *Alfaro,* the Supreme Court gave an informative discussion on its reasoning for refusing to allow the exclusionary rule to apply in probation revocation proceedings.

In part, the opinion states:

> Under the [exclusionary] rule, evidence obtained by violating Fourth Amendment guarantees is not admissible in a criminal proceeding against the victim of the illegal search and seizure. Deterrence of future police misconduct through suppression of illegally obtained evidence is the rule's purpose....
>
> We will pay the price where the purpose of deterrence is served but if application of the exclusionary rule does not effectuate deterrence then the exclusionary rule is being misapplied.

> We think any additional benefit in double application of the exclusionary rule is outweighed by the harm done to the rehabilitative goal of probation. Rather than saying the police will have less incentive to obey the law, we think the probationer will have greater incentive to obey the terms of his probation if any reliable information will be available at a probation revocation hearing."

Id. at 580, 623 P.2d at 10 (internal citations omitted).

C. Disposition Hearing

A probationer may attempt to waive the disposition hearing under Rule 27.8(d). If a waiver is accepted, the court is instructed to continue immediately with the procedures set forth in 27.7(c). See Rule 27.8(d). However, if there is no waiver, the hearing must be held 7 to 20 days after the court's determination that the probationer violated a probation condition. See Rule 27.8(b)(4) and Rule 27.8(c)(1). The disposition hearing may be held on the same day as the violation hearing. *State v. Baylis*, 27 Ariz.App. 222, 553 P.2d 675 (App. Div. 1 1976).

At the disposition hearing, if a final determination has been made that the probationer violated a written condition, the court may continue, modify or revoke probation. Rule 27.8(c)(2). If the probationer did not receive a written copy of the condition or regulation, probation may not be revoked. See Rule 27.8(c)(2). If probation is properly revoked, written notice of the grounds for revoking probation must be given to the probationer. *See State v. Stotts, supra* (judge adequately stated reasons for revoking probation); *State v. Moreno*, 21 Ariz.App. 462, 520 P.2d 1139 (App. Div. 2 1974) (the fact that a written record of the proceeding existed corrected the error that the probationer did not receive written notice of reasons for revocation). When a probation is revoked, all of the terms of probation are revoked. *State v. Moore,* 149 Ariz. 176, 717 P.2d 480 (App. Div. 1 1986).

If probation is revoked, the court must pronounce sentence in accordance with Rules 26.10 through 26.16. See "Sentencing" chapter of this volume of the Prosecutor's Manual.

D. Disposition Due to Subsequent Offense

No violation hearing is required when a probationer has been found guilty of a crime by the same court which had placed the probationer on probation. See Rule 27.8(e); *State v. Lee*, 27 Ariz.App. 294, 296, 554 P.2d 890, 892 (App. Div. 1 1976).

1. Subsequent Offense Must Occur at the Same Court

The term "by the same court," used in Rule 27.8(e), does not demand "that the same judge be involved in both proceedings. [Rather, this demand] is met when the proceedings are in different divisions of the superior court of the same county." *State v. Astorqa,* 26 Ariz.App. 260, 262, 547 P.2d 1060, 1062 (App. Div. 2 1976). See also *State v. Shapiro,* 26 Ariz.App. 536, 549 P.2d 1054 (App. Div. 1 1976); *State v. Smith,* 116 Ariz. 387, 569 P.2d 817 (1977).

However, an automatic violation under Rule 27.8(e) applies only to cases in which both the probation violation matter and the new offense are under the jurisdiction of the same county superior court. If the new charge is prosecuted in a different county, the rule providing for automatic violation of the probation matter does not apply and the court should proceed with the revocation arraignment as set forth in Rule

27.8(a). *State v. Flemming*, 184 Ariz. 110, 114, 907 P.2d 496, 500 (1995). Moreover, the superior court may not make an automatic finding that the probationer violated his probation when the a determination of guilt on a new offense was made in city court. *State v. Zanzot*, 175 Ariz. 83, 85, 853 P.2d 1130 (App. Div. 1 1993)(error in accepting determination of guilt in city court was not fundamental error where there was no defect in city court proceeding).

2. Timing of Revocation Hearing

The hearing must be held in a timely manner. Whether a delay in the hearing is reasonable depends on three factors: the length of the delay, the reason for the delay, and the prejudice to the defendant. *State v. Flemming*, 184 Ariz. 110, 115, 907 P.2d 496, 501 (1995).

A probationer may still be tried on an underlying charge, even though the petition to revoke probation that was based on that same criminal charge, was denied. *See State v. Williams,* 131 Ariz. 211, 213, 639 P.2d 1036, 1038 (1982); *See also State v. Paoletto,* 133 Ariz. 412, 652 P.2d 151 (App. Div. 1 1981). The prior finding by the trial court of no probation violation did not have collateral estoppel or res judicata effect on the subsequent guilty verdict given by the jury). *See generally In the Matter of the Appeal in the Maricopa County Juvenile Action No. J-83341-5,* 119 Ariz. 778, 580 P.2d 10 (App. Div. 1 1980).

Finally, it is not necessary to wait for a conviction based on a criminal charge in order to revoke probation. *See State v. Fahringer,* 136 Ariz. 414, 666 P.2d 514 (App. Div. 2 1983); *See also State v. Jameson*, *supra*. *See generally State v. Love*, 147 Ariz. 567, 711 P.2d 1240 (App. Div. 1 1985); *State v. Rios,* 114 Ariz. 505, 562 P.2d 385 (App. Div. 1 1977). In fact, the Arizona Supreme Court has said it disapproves of the practice of deferring the probation revocation hearing until after the determination of guilt on the new charge. *State v. Flemming*, 184 Ariz. 110, 115, 907 P.2d 496, 501 (1995).

3. Double Jeopardy Does Not Apply

It is not a violation of double jeopardy protections to revoke probation based on a particular criminal charge and then to try the probationer for that same charge, or vice-versa. There is authority that the same conduct that is litigated in a criminal action can subsequently be made the subject of a probation revocation. *See State v. Meeker,* 143 Ariz. 256, 693 P.2d 911 (1984); *State v. Jameson*, 112 Ariz. 315, 541 P.2d 912 (1975); *State v. Hopson*, 112 Ariz. 497, 543 P.2d 1126 (1975). If the charges are filed together with the probation revocation, the revocation should be heard first. *State v. Fahringer,* 136 Ariz. 414, 666 P.2d 514 (App. Div. 2 1983).

E. Timeliness of Proceedings

Rule 27.8 provides time limits for revocation hearings, but those limits are not jurisdictional. *State v. Belcher*, 111 Ariz. 580, 581, 535 P.2d 1297, 1298 (1975). Accordingly, time can be excluded from the time limits set forth in the rule under certain circumstances. Whether that delay is reversible usually depends on whether the probationer suffered prejudice as a result. See *State v. Baylis*, 27 Ariz. App. 222, 225, 553 P.2d 675, 678 (App. Div. 1 1976). The Arizona Supreme Court has suggested that unwarranted delay can be cured by judicial measures that ensure the delay does not expose the probationer to "lengthy unwarranted incarceration." *State v. Huante*, 111 Ariz. 236, 237, 527 P.2d 281, 282 (1974), quoting Rule 27.8, comment. See also *Baylis*, *supra.* For example, in *State v. Belcher*, the probationer's revocation hearing was held 10 days after the statutory 20 day period following his initial appearance . 111 Ariz. 580, 535 P.2d 1297 (1975).

However, the Arizona Supreme Court held that the trial court did not abuse its discretion in denying the probationer's motion to dismiss because he did not show prejudice and because the judge stated that the imposed sentence ran from the date of the probationer's arrest. *Id.*

1. Acceptable Delay

A two month delay in holding a revocation hearing was upheld because the delay was occasioned by the defendant's request for a new attorney and because no prejudice resulted. *State v. Long*, 148 Ariz. 295, 296, 714 P.2d 465, 466 (App. Div. 2 1986).

The time necessary to reassign a judge to conduct probation violation hearing was excludable where the delay was due to the state's exercise of its right to a change of judge and the delay did not prejudice the defendant. *State v. Williams*, 123 Ariz. 112, 116, 597 P.2d 1015, 1019 (App. Div. 1 1979).

A defendant's probation revocation hearing delayed due to a logistical problem between superior court hearings in different counts was not unwarranted. State v. Gray, 115 Ariz. 150, 152, 564 P.2d 101, 103 (App. Div. 2 1977).

Although the trial court erred in failing to calculate the 7 day time limit for the revocation arraignment from the date of the service of warrant instead of the initial appearance, the error was not reversible in the absence of prejudice to the defendant who was given credit for that time upon imposition of sentence. *State v. Lee*, 27 Ariz. App. 294, 295, 554 P.2d 890, 891 (App. Div. 1 1976).

2. Reversible Delay

The court granted the defendant's motion to continue the revocation hearing until it could be heard at the same time as the defendant's new charge, which constituted the basis of the probation violation charge. *State v. Fahringer*, 136 Ariz. 414, 666 P.2d 514 (App. Div. 2 1983).

F. Record of Proceedings

Rule 27.8(f) simply requires that a written record of all the proceedings be made.

XI. Rule 27.9: Admissions By the Probationer

Under Rule 27.9, a probation may be revoked based on a probationer's admission to the court of a probation violation, and evidence to corroborate the admission is not needed to justify that revocation. *State v. Lay*, 26 Ariz.App. 64, 65, 546 P.2d 41, 42 (App. Div. 1 1976).

If a probationer wishes to admit to violating a condition of his/her probation, the court is required to follow the provisions set forth in Rule 27.9. This rule instructs the court to address the probationer directly and to inquire whether he understands the rights and risks involved with his admission and whether a factual basis exists for that admission. *State v. Valentine*, 154 Ariz 332, 742 P.2d 833 (App. Div. 1987), *overruled on other grounds in State v. Glad*, 170 Ariz. 483, 826 P.2d 346 (App. Div. 1 1992). See also *State v. Flowers*, 159 Ariz. 469, 768 P.2d 201 (App. Div. 1 1989) (admission must be voluntary).

Rule 27.9(f) requires the court to inform the probationer that, if he admits to violating his probation by committing a criminal offense, the admission may be used to impeach his testimony at the trial on that offense. *State v. Glad*, 170 Ariz. 483, 826 P.2d 346 (App. Div.1 1992). "[The] possibility that

the testimony will be used for impeachment serves only as an incentive for the defendant to speak truthfully if he does testify." *State v. Boyd*, 128 Ariz. 381, 383, 625 P.2d 970, 972 (App. Div. 1 1981). The fact that testimony may be used for impeachment does not require that a motion for a continuance be granted just so the revocation hearing may be held after the trial for the criminal charges. *Id*. Indeed, the courts require the revocation be tried first. *State v. Fahringer,* 136 Ariz. 414, 666 P.2d 514 (App. Div. 2 1983). Although the court must advise a probationer of his rights and risks in making an admission, remember that the court need not advise the probationer of the mandatory minimum sentence on an underlying conviction at the time of an admission. *See State v. Jones,* 128 Ariz. 378, 625 P.2d 967 (App. Div. 1 1981); *State v. Butler,* 125 Ariz. 289, 609 P.2d 104 (App. Div. 2 1980).

The voluntariness of an admission may be based upon the entire record before the court. *State v. Coon,* 114 Ariz. 148, 559 P.2d 704 (App. Div. 1 1974). If nothing in the record reflects a basis for a trial court's determination that an admission was voluntary, any subsequent revocation may be reversed on appeal. *Id*. at 151. *See also State v. Johnson,* 117 Ariz. 9, 570 P.2d 780 (App. Div. 2 1977) (violation of Rule 27.8 by court); . *State v. Flowers,* 159 Ariz. 469, 768 P.2d 201(App. Div.1 1989) (admission involuntary where it was conditioned on unfulfilled promise regarding probationer's sentence).

On the contrary, in *State v. Kovacevich*, 26 Ariz.App. 216, 218, 547 P.2d 487, 489 (App. Div. 1 1976), although the trial court did not expressly advise the probationer of some of his rights under Rule 27.9, no reversal of the revocation was required because the record showed that the defendant made a knowing and intelligent waiver of his rights.

XII. Rule 27.10: Revocation of Probation in Absentia

"Rule [27.10], revocation of probation in absentia, is a necessary and constitutional rule...." *State v. Alegre*, 120 Ariz. 323, 324, 585 P.2d 1235, 1236 (1978). The rule allows the state to revoke a person's probation in absentia when the probationer's whereabouts are unknown to the probation officer for 60 days. *State v. Canady,* 124 Ariz. 599, 601, 606 P.2d 815, 817 (1980). "Because of the extreme nature of the remedy, [of Rule 27.10] however, there must be strict compliance with the rule." *Id.* (Emphasis added.)

Although there is no requirement that the state move to revoke a person's probation in absentia once the probationer's whereabouts are unknown for 60 days or that the court grant such a request, it may be advisable to make the motion in order to prevent a due process claim of unreasonable delay. In *State v. Adler*, 189 Ariz. 280, 942 P.2d 439 (1997), the defendant absconded from supervision after being rejected for interstate compact supervision. The probation officer filed a petition to revoke but the state never sought to revoke his probation in absentia. Even after the defendant was taken into federal custody, the state failed to seek extradition to Arizona for probation violation proceedings and refused the defendant's request for disposition in absentia. The Arizona Supreme Court found the state's refusal to proceed in absentia as evidence of unreasonable delay in prosecuting the probation violation proceeding. The delay, combined with the prejudice suffered by the defendant as a result, resulted in a dismissal of the petition to revoke with prejudice.

Note that although a person's probation may be revoked in absentia, that person may not be sentenced in absentia. *State v. Bly,* 120 Ariz. 410, 413, 586 P.2d 971, 974 (1978). Also note that defendant's absence from the jurisdiction or required supervision stops the probation period clock from running. A.R.S. § 13-903(C).

XIII. Rule 27.11: Victim's Rights in Probation Revocation Proceedings

In accordance with the Arizona Constitution provision regarding victim's rights, Rule 27.11 incorporates Rule 39 into probation revocation proceedings. Specifically, the rule requires the court to provide the victim the opportunity to be present and be heard at any probation revocation proceeding in which the following conditions are met:

> (1) the termination of probation or intensive probation; (2) probation revocation dispositions; (3) modifications of probation or intensive probation terms that will substantially impact the probationer's contact with or safety of the victim or that affects restitution or incarceration status; or (4) transfers of probation jurisdiction.

The comment to the 1991 amendment to Rule 27.11 cites Ariz. Const. Art. II, § 2.1(A)(9) regarding the right of the victim to be heard "at any proceeding when any post-conviction release from confinement is being considered" as applying to probation modification proceedings when the modification "might threaten or endanger the victim, affect the victim's right to restitution, or result in a lesser degree of custody of the defendant." Routine and summary modifications of probation that will not affect the victim should not be affected by this rule.

XIV. Rule 27.12: Probation Review Hearing

Rule 27.12 sets forth the procedure for conducting a special review hearing for young probationers serving a probation term for a criminal offense that requires sex offender registration pursuant to A.R.S. § 13-3821. The right to a probation review hearing is limited to probationers under the age of 22 who committed the registration-eligible offense when the probationer was under the age of 18. Rule 27.12(a). *See also* A.R.S. § 13-923.

The purpose of the probation review hearing is to give the young offender the opportunity to modify the conditions of probation relating to the probationer's sex offender registration and/or community notification. *See* Rule 27.12(d).

A. Requesting A Hearing

Review hearings are not automatic. The probationer must file a request for a hearing with the court no later than 30 days before his/her 22nd birthday. Rule 27.12(b),(c)(1). Once the probationer has made the request for a probation review hearing, the court must conduct a hearing at least once a year. Rule 27.12(a). However, nothing precludes the court from holding more than one review hearing per year. A.R.S. § 13-923(B).

In order to request a hearing under Rule 27.12, the probationer must file a request with the court and provide a copy of the request to the prosecutor. Rule 27.12(b). After the probationer has filed his request, the court must set a hearing within 30 days. Rule 27.12(c)(2). Once the hearing date is set, the court must notify the probationer's attorney and the probationer's probation officer. Rule27.12(e)(2)(3). The prosecutor is required to notify any victim or his/her attorney of the hearing. Rule 27.12(e)(1). In such cases, the court must provide the prosecutor with at least 7 calendar days' notice of the hearing date so that they may fulfill their duty to notify the victim. Rule 27.12(f).

B. Pre-Hearing Procedures

Prior to the hearing, the court must order the probation department to draft a probation review report, which must be delivered to the court at least 7 days in advance of the hearing. Rule 27.12(g). The court also has the option of holding a pre-hearing pursuant to A.R.S. § 13-923. Rule 27.12(h). At the pre-hearing, the prosecutor, probation officer, victim(s) and probationer's attorney may discuss issues relating to the continuation, modification, and/or termination of the probation, the registration requirement and/or the community notification requirement. A.R.S. § 13-923(F).

C. Hearing

At the hearing, the court must hear from the prosecutor, the probationer and his attorney, the victim(s), and the supervising probation officer. A.R.S. § 13-923(E). After each has had the opportunity to advise the court concerning the issues set forth in the statute and rule, the court shall consider whether to (1) continue, modify or terminate probation; (2) continue to require, suspend or terminate the probationer's sex offender registration; and (3) to continue, defer or terminate community notification of the probationer's sex offender status. A.R.S. § 13-923(E); Rule 27.12(d).

XV. Sentencing a Probationer

Rule 27 covers sentencing by incorporation of Rules 26.10-26.16. The following section very briefly covers some of the requirements the court must follow when sentencing a probationer after it has been determined that a condition has been violated.

When a court revokes a person's probation, that action revokes all of the terms of probation. *State v. Moore,* 149 Ariz. 176, 177, 717 P.2d 480, 481 (App. Div. 1 1986) (court could not order probationer to continue probation condition of restitution when the probation was revoked and probationer was given prison time). When revoking a person's probation, the court must prescribe a sentence. *Id*.

If the court places the defendant on intensive probation subject to a particular condition that the defendant is later found to be unable to satisfy, the court is then back to square one and may sentence the defendant to prison. *State v. Bradley*, 175 Ariz. 504, 505, 858 P.2d 649, 650 (1993).

A. Credit Time

The language of A.R.S. § 13-903(F) "requires that a defendant be credited with probationary jail time if a subsequent sentence is imposed." *State v. Brodie*, 127 Ariz. 150, 151, 618 P.2d 644, 645 (App. Div. 1 1980). The Court of Appeals also held in *Brodie* that the court did not have to give credit for pre-sentence jail time to a defendant sentenced to a jail term as a condition of probation. This decision has been criticized but not explicitly overruled. *See State v. Snider*, 172 Ariz. 163, 835 P.2d 495 (App. Div. 1 1992).

In *Snider*, the Court of Appeals held that a defendant is not entitled to credit toward a probationary jail term for time spent incarcerated while pending disposition of his probation revocation. *Id*. at 166, 835 P.2d at 498. The court based its decision on A.R.S. § 13-903(C), which provides that the probation period is tolled while a probation revocation proceeding is pending.

If a defendant was placed on a probation for a crime committed prior to the effective date of the revised criminal code, then that defendant has no right, when sentenced, to claim the time credit entitlement set forth in A.R.S. § 13-903(E). *State v. Jones,* 128 Ariz. 378, 380, 625 P.2d 967, 969 (App. Div. 1 1981).

Also, credit time may also be given for time the probationer has spent on authorized release. In *Green v. Superior Court, Cochise County,* 132 Ariz. 468, 647 P.2d 166 (1982), the defendant had been sentenced to one year jail time as a condition of probation but was allowed to leave the jail so he could work, provided that he return at the end of his work day. Near the expiration date of the jail period, the defendant's probation officer discovered the defendant had been absent at times other than those authorized for work release. At sentencing, the court refused to revoke defendant's probation, but required him instead to serve all the time he had been released, including the time he had been legitimately out. The Arizona Supreme Court determined that the judge abused his discretion since "all time spent on authorized release is part of the period actually spent in confinement and is to be applied against both that imprisonment permitted by the statute as a condition of probation and the maximum period of confinement set by that statute." *Id.* at 471, 647 P.2d at 169; A.R.S. § 13-901(F).

B. Enhanced Punishment

For enhanced punishment purposes, a person is on probation until the probationary period has been discharged. *See State v. Meehan,* 139 Ariz. 20, 22, 676 P.2d 654, 656 (App. Div. 2 1983); *State v. Winton,* 153 Ariz. 302, 305, 736 P.2d 386, 389 (App. Div. 1 1987). *See generally State v. Chavez,* 693 P.2d 936, 143 Ariz. 281 (App. Div. 1 1984), *vacated in part in State v. Chavez,* 143 Ariz. 238, 693 P.2d 893 (1984) (judge did not abuse discretion when he sentenced probationer to 10 years in prisoner for aggravated assault, to run consecutive to another sentence for a different charge, even though probationer had originally been ordered to serve only five years probation for that same crime); *State v. Gray,* 115 Ariz. 150, 152, 564 P.2d 101, 103 (App. Div. 2 1977) (court was allowed to impose a sentence congruent with a felony even though the defendant's original violation was treated as a misdemeanor, because the defendant's plea of guilty on the original violation was for a felony).

A judge has wide latitude in sentencing the defendant. However, he must consider all pertinent aggravating and mitigating circumstances. *State v. Baum,* 182 Ariz. 138, 893 P.2d 1301 (App. Div. 1 1995). The court must impose a sentence based on the original offense, not the violation of the probation alone. *Id.* at 140, 893 P.2d at 1303. However, the court can consider "the fact that defendant failed to avail himself of the opportunity to reform." *Id.* citing *State v. Rowe,* 116 Ariz. 283, 284, 569 P.2d 225, 226 (1977).

A sentencing judge may consider the probationer's failure to confess to a crime he's been convicted of for sentencing purposes. However, to do so for a probation revocation petition prior to conviction violates the Fifth Amendment. *See State v. Lask,* 135 Ariz. 612, 614-15, 663 P.2d 604, 606-07 (App. Div. 1 1983).